IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 332

SOUTHERN RAILWAY COMPANY,
*Petitioner,*

vs.

JOHN H. JACKSON,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Southern Railway Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above styled case on April 4, 1963.

## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, overruling Jackson's motion for new trial (R. 692-694) is unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 712-721) is reported at 317 F.2d 532 (C.A. 5th 1963).

The opinion of the United States Court of Appeals for the Fifth Circuit denying the petition for re-hearing (R. 749, 750) is reported at 317 F.2d 532, 537 (C.A. 5th 1963).

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on April 4, 1963 (R. 712-721), and a copy thereof is appended to this petition in the Appendix at pages A1 to A10.

The petition of the Southern Railway Company for a rehearing was denied on June 7, 1963 (R. 749, 750), and a copy of the opinion thereof is appended to this petition in the Appendix at pages A11 to A13.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

## QUESTIONS PRESENTED

The trial court included within its charge to the jury certain instructions on the issue of contributory (comparative) negligence. The U.S. Court of Appeals of the Fifth Circuit reversed, holding that it was erroneous to submit to the jury questions of contributory (comparative) negligence. Thus, the questions presented are:

(1) Whether the appellate court was erroneous in holding as a matter of law that the question of contributory (comparative) negligence should not be submitted to the jury.

(2) Whether the Southern Railway Co. has been deprived of the right to a jury trial on the question of contributory (comparative) negligence.

(3) Whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

(4) Whether a jury can ever be authorized to consider whether a U. S. Railway mail clerk, in the exercise of ordinary care for his own protection, has any duty to stop or attempt to stop a run-away train by throwing on the emergency brake system.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Seventh Amendment, Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Georgia Code, Section 94-703: "Consent or negligence of person injured as defense; comparative negligence as effecting amount of recovery. No person shall recover damages from a railroad company for injury to himself or to his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

Georgia Code, Section 105-603: "Diligence of plaintiff. If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in someway have contributed to the injury sustained."

## STATEMENT OF FACTS

On December 22, 1959, Southern Railway Company's Passenger Train No. 1 was proceeding in a southerly direction and approaching Mableton, Georgia. One of the cars on Train No. 1 was a "mail car" which Southern Railway Company was required by law to transport (39 U.S.C. 541; R. 39, Stipulation in Pre-trial Order).

Riding in the mail car as employees of the United States Government were three Railway Postal Clerks (Jackson, Gardner, and Billingsley), and one Railway Postal Supervisor (McClure). As Train No. 1 was approaching Mableton, Georgia, signal No. 39 (located 974 feet from the point of collision; plaintiff's exhibit No. 13) displayed a red board. The Southern Railway Company engineer failed to heed the "stop" warning of the red board, and Train No. 1 proceeded to crash head-on into Southern Railway Company Freight Train No. 86, allegedly causing injuries to the occupants of the mail car. Each of the occupants of the mail car, and Mrs. McClure, sued Southern Railway Company for the aggregate sum of Four Hundred Sixty-eight Thousand Eight Hundred Fifty-one Dollars and Seventy-seven Cents ($468,851.77). The basis for jurisdiction in the court of first instance was 28 U.S.C.A., Section 1332. The cases were consolidated for trial (R. 37, Pre-trial Order).

### A. Indulging Inferences Which Permit the Upholding of the Trial Judge's Action.

The evidence, construed most favorably to uphold the trial court, was as follows:

As Train No. 1 was approaching the red board, Billingsley (one of the occupants of the mail car) observed that the lights were red (R. 221). Billingsley made this observation when he was 1,400 feet from the collision point,[1] and 30 seconds before collision time.[2] Because of his past experience and training, Billingsley immediately yelled out: "He's running those red lights." "I don't believe he can stop at the red light. The lights are red and I don't believe he can stop at the red light." (R. 223).

Jackson, an experienced railroad man with approximately ten years service as a railway employee, considered himself a "smart railroad man," even though he was temporarily a mail clerk at the time of the collision (R. 140, 141). Jackson knew the railroad was on Centralized Train Control, and that because of such control, trains sometimes go northbound on tracks which were, in the old days, considered strictly southbound tracks (R. 160, 161). Furthermore, Jackson knew that a red board means stop, and that it doesn't make any difference even if the train is on a so-called double track (R. 160, 161).

In spite of this knowledge that Jackson had acquired through approximately ten years of railroad experience,

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1. "A. We were going around the curve when I saw those lights. . . . Q. And you estimate that you were about twelve hundred feet? A. Twelve to fourteen hundred feet, yes, sir." (R. 221).

2. Although Billingsley stated that he first saw the lights "maybe twenty seconds" before accident time (R. 223), Jackson stated that Billingsley's first warning about the red board was given "thirty seconds prior to the accident" (R. 141, 142).

Jackson responded to Billingsley's first warning, saying: "You crazy idiot, it's double track." (R. 141). Then approximately fifteen seconds before collision time, Billingsley responded to Jackson with a second warning, stating: "No, he's on the same track, watch out, they are going to hit." (R. 141, 142).

Billingsley admitted that when he first saw the red board, he was six feet from the emergency cord[3] which, when pulled, automatically stops the train (R. 222). An examination of plaintiff's exhibit 14 shows that Jackson was approximately three feet from Billingsley.

When examined by the Court, Billingsley again admitted that pulling the emergency cord automatically stops the train (R. 229). Furthermore, the Court examined Billingsley concerning the location of this emergency cord by asking, and obviously pointing simultaneously to an exhibit within the observation of the jury: "Q. Is that the cord up there? A. Yes, sir." (R. 229). The only exhibit to which the trial court could logically have been pointing was plaintiff's exhibit 14. The mail car appearing at the top of the picture has several lines running the entire length of the car, and the court was probably referring to one of said lines.

Thus, the location of the emergency cord (which actually ran the entire length of the mail car) and the actual position of Jackson (see plaintiff's exhibit 14) in relation to said emergency cord, during the series of events prior to and after the collision, were exhibited and made known to

3. "Q. . . . now, how far were you away at the time you observed the lights were red from the cord that you pull that actually puts the emergency brakes on on that train? A. The cord is approximately six to eight feet from me, from where I was." (R. 222)

the members of the jury. Jackson, an experienced railroad man, was in a position to pull the emergency cord.

An inspection of plaintiff's exhibit 14 discloses Jackson's location in relation to the doors and windows of the mail car. Jackson, an experienced railroad man, was in a position to look out of said doors and windows when first warned by Billingsley in order to determine whether Train No. 1 was running a red board.

Estimates concerning the speed of Train No. 1 ranged from "I just don't know" (Jackson, R. 143), "40 to 45 miles per hour" "some eight seconds before" the collision (McClure, R. 124), and "35 miles per hour" at impact (McClure, R. 125). However, even at a speed of 45 miles per hour, Train No. 1 could have stopped, or the crash impact could have been diminished, if Jackson (the experienced railroad man) had pulled the emergency cord (R. 556 *et seq.*).

Dr. Rice, upon examining Jackson on December 22 and December 24, 1959 (the day of the accident and two days later) "didn't think he'd lose any time from work" (R. 515 *et seq.*). Under this evidence, Jackson lost no compensable time as a result of the December 22, 1959, collision. Even if Jackson is given the benefit of the doubt under defendant's evidence, Jackson lost one day's wage or a total loss of salary and wages of Thirty ($30.00) Dollars.[4]

Jackson swore, among other things, that the December 22, 1959, collision caused injuries to his back and left

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4. Dr. Turk, a witness for Jackson, testified that he "dismissed" Jackson "from treatment" on January 25, 1960, and at that time Dr. Turk "thought he was ready to return to work" as of January 27, 1960 (R. 351, 352). Under this plaintiff's evidence, a jury would have been authorized to conclude that Jackson's total loss of salary and wages attributable to the December 22, 1959, collision amounted to less than $700.

shoulder (R. 133). Yet two days after the accident when Dr. Rice saw Jackson the second time, he was complaining not of the left shoulder and left arm, but rather of the right forearm and right shoulder (R. 515, 531, 532, 533). On December 29, 1959, Jackson reported to Dr. Turk, who was in no way connected with the railroad, and complained of both shoulders, including the right. Dr. Turk made X-rays of the left shoulder one week after the accident, and concluded that the X-rays showed no shoulder separation (R. 350). Dr. Walter Sale, at the request of Dr. Martin T. Myers, made X-rays of Jackson's left shoulder on February 6, 1960 (R. 435, 437), and concluded that Jackson had a normal left shoulder (R. 437). Also, Dr. Wood Lovell, a physician for the National Postal Transportation Association of Portsmouth, New Hampshire, concluded that Jackson's left shoulder was normal (R. 378, 381).

On the basis of the X-rays taken by Dr. Sale on February 6, 1960, Dr. Myers concluded that Jackson's left shoulder required a wiring operation (R. 600, 601). Such operation was performed in December, 1960, notwithstanding that Doctors Turk, Lovell and Sale all felt that pre-operative X-rays revealed a normal shoulder. Under all the evidence, this shoulder operation was unnecessary, and any medical expenses connected with such operation were uncollectible.

The trial of the consolidated cases resulted in verdicts as follows: Jackson—$2,500.00 (R. 683); Gardner—$1,000.00 (R. 684); Billingsley—$1,500.00 (R. 684); McClure—$15,000 (R. 683); and Mrs. McClure—$750.00 (R. 683). Thus, the aggregate verdicts were $20,750.00, or considerably less than 5% of the sums sought.

**B. Statement of Germane Facts by the Trial Judge.**

Only Jackson moved for a new trial (R. 686-691). One of the major issues raised in Jackson's motion for new

trial was whether the court was correct in charging the jury on the subject of contributory (comparative) negligence.

The trial judge, who heard the entire case, found some evidence of contributory negligence on the part of Jackson, and answered the principal contention of Jackson in denying his motion for new trial (R. 692-694), as follows:

> "The Court does not see any merit in the contentions of the plaintiff, and, therefore, denies his motion for a new trial. The principal reason why plaintiff contends that he is entitled to a new trial appears to be the charge of the Court in regard to contributory negligence and the failure of the Court to direct a verdict as to liability. In that regard, it appears that definite factual matters existed which would preclude the rendering of a decision based on a question of law alone. The plaintiff had had a great deal of experience as a fireman by his own admission. His own testimony is to the effect that some thirty seconds before the collision he heard Mr. Billingsley's report that the engineer was running a red board, and that some fifteen seconds before the accident he heard Billingsley say that a collision was imminent. Everyone testified that the cord which would have put the brakes into emergency was not pulled." It seems to the Court that this most certainly presents a factual issue in that the jury was authorized to find that the cord should have been pulled as long as thirty seconds before the accident took place. Since this situation then was obviously present: the question of whether certain judgment should have been exercised in light of prevailing circumstances is for the triers of the facts, and most conclusively negates the plaintiff's contention that only a question of law was involved.
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> "The other grounds upon which plaintiff seeks a new trial will not be discussed in this order. Suffice it to say that the Court does not consider any of them to be sufficient and, therefore, hereby denies the motion."

**C. The Appellate Court's Decision.**

On appeal, the United States Court of Appeals for the Fifth Circuit reversed, and ordered the cause remanded for a new trial (R. 712-721). The appellate court held substantially as follows:

(1) As a matter of law, under the law of Georgia, there are absolutely no circumstances which would ever authorize a jury to find that a U. S. Railway mail clerk, in the exercise of ordinary care for his own protection, has any duty to stop or to attempt to stop a run-away train by throwing on the emergency brake system; and

(2) As a matter of law, under the law of Georgia, the circumstances shown by the evidence in the instant case conclusively demonstrate that Jackson was in no way and to no degree, negligent; and

(3) Hence a charge which permitted a jury to find from the evidence (or to find to the contrary) that Jackson was negligent and that his negligence contributed, however slightly, to his injury, was under Georgia law reversible error; and

(4) That without question, Jackson occupied the status of a passenger. (Southern Railway Co. has always contended that a mail clerk under the law of Georgia does not occupy the same status as ordinary passengers and is not owed extraordinary care, and has also always contended that for purposes of this case the duty of care owing to Jackson by the railway neither increased nor diminished the duty of care owing by Jackson for his own protection.)

The petition by the Southern Railway Co. for a rehearing was denied (R. 749, 750). The appellate court, after admitting that Jackson had been warned, reasserted its position that as a matter of law, the jury was not au-

thorized to consider whether Jackson was in any degree negligent, however slight that negligence may have been.

## WHY THE WRIT SHOULD BE GRANTED

The writ should be granted because the appellate court, in rendering its decision and judgment of April 4, 1963, has pre-empted the jury's function in determining whether Jackson was in any degree negligent, however slight that negligence may have been. Thus, the spirit and intent of the seventh amendment to the United States Constitution have been violated.

The seventh amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In reviewing the judgment of the U. S. District Court, the appellate court necessarily re-examined the testimony of the witnesses, weighed the conflicting evidence, and held that the issue of contributory (comparative) negligence should not have been submitted to the jury. This appellate decision is still another continuation of "the gradual process of judicial erosion which has worn away a major portion of the essential guarantee of the seventh amendment."

It is a well recognized prineiple that in determining whether an issue should be submitted to a jury, all reasonably possible inferences must be made in favor of the opposite party. Furthermore, the jury should be given

the opportunity to make reasonable inferences from facts which are proven in evidence and which have a reasonable tendency to sustain them.

**A. The Georgia Law of Comparative Negligence.**

The controlling substantive law of Georgia, insofar as it relates to the effect of the negligence of a plaintiff upon his right to recover at all, and if permitted to recover at all, upon the diminishment of damages to which he might otherwise be entitled, is as follows:

(1) No matter how negligent the defendant may have been, if the plaintiff in the exercise of ordinary care could have avoided the consequences to himself of the defendant's negligence, after the same was actually discovered, or in the exercise of ordinary care could have been discovered, such plaintiff is wholly barred of recovery.

(2) One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the taking of such risk in and of itself amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence.

(3) If the negligence of the plaintiff proximately contributing to his injury is equal to or greater than the negligence of the defendant proximately contributing to the plaintiff's injury, then no recovery is permitted.

(4) If the negligence of the plaintiff proximately contributing to his injury is less than the negligence of the defendant proximately contributing to the plaintiff's injury, plaintiff may recover but his recovery shall be diminished by the fact-finding body in proportion to the amount of negligence attributable to the plaintiff.

In connection with the principles of Georgia negligence law enunciated above, the attention of the court is invited to the following: Georgia Code Annotated, Sections 94-703 and 105-603; *Smith v. American Oil Company*, 77 Ga. App. 463, 49 S.E.2d 90; *City of Columbus v. Griggs*, 113 Ga. 597, 38 S.E. 953; *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E. 6.

**B. The Appellate Court Pre-empted the Jury's Function on Issues Concerning the Emergency Cord.**

The appellate court's decision and judgment rendered on April 4, 1963, has, in effect resulted in a directed verdict for Jackson on the issue of liability. Construing the evidence most favorable to uphold the verdict, there was ample evidence of Jackson's contributory negligence and sufficient evidence to warrant the court's charge to the jury on the subject of contributory negligence.

In rendering its decision and judgment of April 4, 1963, the appellate court was laboring under the mis-apprehension that the emergency cord was located at some fixed point in the mail car. The fact of the matter is that the emergency cord ran the entire length of the car, including the entire length of that half of the car occupied by the mail clerks.

The trial court itself pinned down the exact location of this emergency cord by asking Billingsley: "Q. Is that the cord up there? A. Yes, sir" (R. 229). It is perfectly obvious from this question that the trial court was referring to one of the Exhibits, and pointing out some line which in the Court's conception, represented the emergency cord.

The only Exhibit to which the trial Court could logically have been pointing was plaintiff's exhibit 14. An examination of exhibit 14 discloses that the diagram of a

mail car appearing in the top part of said Exhibit contains several lines which run the entire length of the car. Since the emergency cord did in fact run the entire length of the mail car, the trial judge was undoubtedly pointing to one of said lines.

Furthermore, whatever line the trial court did point out, the pointing was done before the members of the jury. It was so obvious the emergency cord ran the entire length of the car that tying it down conclusively was not deemed necessary.

The appellate court was also laboring under the misapprehension that Jackson's position in relation to the emergency cord was unknown. Not only did the trial court point out the location of the emergency cord (R. 229), but a quick glance at plaintiff's exhibit 14 will demonstrate the fallacy in this construction of the evidence. All of the occupants of the mail car placed their initials on plaintiff's exhibit 14, indicating the position of each both before and after the collision. Thus, the position of Jackson in relation to the emergency cord was clearly available to the members of the jury, and the jury had the right to consider whether Jackson was in a position to pull the cord.

Jackson himself was a railroad man of many years' experience. With such experience, Jackson shared the common knowledge among all experienced railroad men that each railroad car has an emergency cord which runs the entire length of each car, and which, when pulled, automatically stops the train. For what purpose was the emergency cord run through the mail car if not to be used by one of the occupants in an emergency, particularly by an experienced railroad fireman acting as a mail clerk, like Jackson?

### C. The Appellate Court Pre-empted the Jury's Function in Determining Whether Jackson Knew, or in the Exercise of Ordinary Care Could Have Known, That a Collision Was Imminent.

In rendering its decision and judgment of April 4, 1963, the appellate court was laboring under the mis-apprehension that Jackson had no way to determine that a collision was imminent. Plaintiff's exhibit 14 reveals that there were three (3) windows and one (1) door on each side of the mail part of the combination mail and baggage car. There is nothing in the record to indicate that Jackson could not have seen the red board by looking out the window after Billingsley's first warning thirty seconds before the collision, and after Billingsley's second warning fifteen seconds before the collision. But in any event (whether Jackson had the ability or not to see out the window), the jury had the right to find from the facts:

(1) That Billingsley's warnings, both thirty seconds and fifteen seconds before collision time, were enough in and of themselves to cause Jackson to reach for the emergency cord—Jackson being an experienced railway fireman and it being obvious to him that something was gravely the matter; or

(2) That Billingsley's first warning was at least sufficient to cause Jackson to stop doing whatever he was doing and to proceed to the door to determine for himself whether the lights were in fact red. If Jackson had heeded the warning even to this extent, he could have easily been at the door when Billingsley gave the second warning fifteen seconds before collision time. Under the evidence, had he been at the door he could have observed that a collision was imminent and, being an experienced fireman, reached for the emergency cord.

**D. General Considerations of Law.**

Whether facts are sufficient to take a particular issue to the jury has been decided to be governed by Federal rather than State standards. See *Reiter* v. *Eastern Airlines, Inc.*, (C.A. 5th 1955) 226 F.2d 443; *Togue* v. *Great Atl. and Pac. Tea Co.*, (C.A. 5th 1957) 242 F.2d 575. But whatever the answer to this vexing problem, the following principles were overlooked by the appellate court:

(1) ". . . not only may an issue of fact arise from contradictory evidence, but contrary implications consistent with the testimony may arise from the proved facts; and in still other ways the question of what is true may remain an issue of fact despite uncontradicted evidence in regard thereto . . . in order to render any finding of fact demanded as a matter of law, not only must there be no controversy in the evidence material to the issue involved, but the implications and inferences which logically and properly arise from the evidence must necessarily lead to only one conclusion." *Liberty Mutual Insurance Company et al.* v. *Blackshear et al.*, 197 Ga. 334, 336, 28 S.E.2d 860.

(2) In arriving at a conclusion upon disputed issues of fact, a jury may believe a part of the testimony of a witness or witnesses and reject another part thereof. See *Pass* v. *Firestone Tire & Rubber Company*, (C.A. 5th 1957) 242 F.2d 914(3), and *Ocean Accident and Guaranty Corporation et al.* v. *Lane*, 64 Ga. App. 149, 12 S.E.2d 413.

(3) The testimony of a party as a witness in his own behalf is to be construed most strongly against him where the same is self-contradictory, vague or equivocal. See *Garrett* v. *Louisville and Nashville Co.*, 86 Ga. App. 806; 72 S.E.2d 550; *Roanoke City Mills, Inc.*, v. *Whelchel*, (C.A. 5th 1954) 208 F.2d 66 (2).

(4) The jury is the sole judge of the credibility of the witnesses and where it believes that one has testified falsely in any particular it has the right (though not the duty) to apply the maxim "falsus in uno, falsus in omnibus" and reject the testimony of such witness in its entirety. See *Banker's Health and Life Ins. Co.* v. *Nichols*, 44 Ga. App. 536, 162 S.E. 161 (2).

In rendering its decision and judgment of April 4, 1963, the appellate court has overlooked the following cases wherein it is recognized that the issue of negligence is a two-way street:

(1) "This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if negligence might justify a finding either way on those issues." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413.

(2) "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty is it to settle the dispute by choosing what means to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 744.

(3) "As we have pointed out, under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers' Liability Act may not be narrowly bounded, and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is exclusively within its field. This is true for every purpose in the case, and, in according

the jury its inherent function, recognition of the right in one aspect or incident of a case is as important as in another." *Henwood* v. *Coburn*, 165 F.2d 418 (C.C.A. 8th 1948).

(Although the case now pending before this court is not an FELA case, the negligence principle set forth in the *Henwood* case, *supra*, is still applicable.)

(4) ". . . if there exists any evidence from which negligence might be fairly inferred, the question is one for the determination of the jury even though the jury's verdict involved some speculation and conjecture in regard to some of the links of the chain of reasoning by which the conclusion was resolved. . . . The rule should be applied equally to employees as well as employers." *Wilson* v. *Union Pac. R. Co.*, 231 P.2d 775 (Utah 1951).

(Although Jackson was not an "employee", the rules of negligence should nevertheless be equally applied to Jackson as well as to Southern Railway Company.)

The appellate court also overlooked, as it pre-empted the jury's function, the following language from the case of *Dixon* v. *Virginian Railway Company*, (C.A. 4th 1957) 250 F.2d 46, 462:

"That is not to say that there was not evidence amply sufficient to support a different conclusion, but as this court recently said in *Atlantic Coast Line R. Co.* v. *Truett*, 4 Cir., 249 F.2d 215, 217, 'Distilling the essential truth from a raw mixture of circumstances is the fact finders function, and the jury is the instrument our system provides for this purpose.' Courts are, and should be, astute not to substitute their judgment on issues of fact for that of the jury's when different inferences may be reasonably drawn from the evidence."

**E. The Appellate Court Has Pre-empted the Jury's Function in Determining Whether Jackson Acted with Such Care As an Ordinarily Prudent Person Would Exercise.**

In rendering its decision and judgment of April 4, 1963, the appellate court said: "The proposition that any person in the position of a passenger whether in a passenger car or in a mail car owes a duty to stop a run-away train by throwing on the emergency brake system is something that we cannot accept."

While this is not the place to argue that the duty with respect to a mail clerk is only due care (in this case there is no question but that Southern Railway Company was negligent) it is well to point out that the appellate court has become so entranced with the alleged sacrosanct position of a passenger that it has confused the heavy duty resting on a railroad toward a passenger with the duty resting upon the alleged passenger to exercise ordinary care for his own protection. The court seems to feel that because the railway is burdened with a heavy duty, this somehow counterbalances the duty resting upon the passenger and in effect, eliminates it. This court then has laid down the arbitrary rule that no person toward whom the railway owes a duty of extraordinary care, no matter whether he be an experienced railway man himself fully familiar with all the procedures and the functions of all of the men and instrumentalities, shall ever be deemed to be under an obligation to stop a train known by him to be a run-away train, even though the alternative may be his own death.

In deciding as a matter of law that there was absolutely no evidence of negligence on the part of Jackson, the appellate court misconstrued and misapplied the "emergency doctrine" of Georgia as contained in the case of *Everett v. Clegg*, 213 Ga. 168, 170, 97 S.E.2d 689, 691,

The *Everett* case, *supra*, held that a person confronted with a sudden peril not arising from any fault of his own, "will not be held negligent when he exercises the right to take care of himself in order to avoid injury, provided he acts with such care as an ordinarily prudent person would exercise."

The appellate court pre-empted the right and duty of the jury to determine whether as a matter of fact Jackson (an experienced railroad man), when confronted with a sudden peril not arising from any fault of his own, did act with such care as an ordinarily prudent person would exercise. Also, the appellate court neglected to recognize that the suddenness of the peril itself was one for jury determination.

One confronted with a sudden emergency, without having sufficient time to determine with certainty the best course to pursue, is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. However, the arising of such an emergency does not relieve one from the obligation of exercising ordinary care, but is merely one of the circumstances which is proper for consideration in determining whether ordinary care has been exercised and the fulfillment or breach of such duty of ordinary care by the person so confronted with a sudden emergency is a jury question. *Napier* v. *DuBose*, 45 Ga. App. 661, 165 S.E. 773; *Clackler* v. *Barnwell*, 83 Ga. App. 515 (3), 64 S.E.2d 384 (3).

The Trial Judge, who heard all the evidence in this the Jackson case, concluded that the issue of contributory negligence on the part of Jackson was for the triers of fact. The Appellate Court, in deciding contrary thereto, has pre-empted the jury's function.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

CHARLES J. BLOCH,
Division Counsel,
Southern Railway Company,
P. O. Box 176,
Macon, Georgia,
*Attorney for Petitioner.*

Of Counsel:

EDGAR A. NEELY, JR.,
Assistant Division Counsel,
1240 Bank of Georgia Building,
Southern Railway Company,
Atlanta 3, Georgia.

## CERTIFICATE

Copies mailed to opposing counsel as per Certificate of Service on file.

A1

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19901

JOHN H. JACKSON,
Appellant,

vs.

SOUTHERN RAILWAY COMPANY,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.
(April 4, 1963)

Before TUTTLE, Chief Judge, and POPE* and JONES, Circuit Judges.

POPE, Circuit Judge: Appellant, a citizen of Georgia, brought this action against Southern Railway Company, a corporation of the State of Virginia,[1] seeking recovery of

*Of the Ninth Circuit, sitting by designation.

1. An examination of the complaint indicates how close the plaintiff came to alleging lack of jurisdiction. The complaint alleged:

". . . that said defendant is a citizen of the State of Virginia, with headquarters in Richmond, Virginia, and with the principal office and place of doing business at 99 Spring Street, S.W., Atlanta, Fulton County, Georgia, and has a designated agent for service, Mr. M. W. Taylor at said address within the jurisdiction of this Court. . . ." Jurisdiction in the court below could only be invoked under Title 28, U.S.C., § 1332, the so-called "diversity" jurisdiction, which provides that, "for the purposes of this section and § 1441 of

damages for personal injuries in an amount substantially in excess of $100,000. The jury returned a verdict for plaintiff in the sum of $2500. The principal contention upon this appeal by the plaintiff is that the trial court committed reversible error in giving to the jury an instruction on comparative negligence and that the smallness of the verdict is attributable to that error.

The record shows that on December 22, 1959, plaintiff was riding in a mail car as a United States postal railway mail clerk. The car was a part of the defendant's passenger train southbound. At a point near Mableton, Georgia, the train ran through a red light stop signal set against its travel past that point and head on into a freight train standing on the same track and headed in the opposite direction. Plaintiff, who was standing in the mail car slightly to the rear of the center thereof, was thrown forward into a

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this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." See Canton v. Angelina Casualty Company, 5 Cir., 279 F.2d 553. Had the allegation quoted above been to the effect that "Its principal office and place of doing business", etc., was at 99 Spring Street, it would be difficult to say that the plaintiff had not pleaded a lack of diversity. However, in stating that "the principal office and place of doing business", etc., was at 99 Spring Street, when read with the allegation of "headquarters in Richmond, Virginia", may well mean simply that the principal office in Georgia was at 99 Spring Street. No question as to diversity of citizenship was raised in the court below; indeed the answer expressly admitted "that this court has jurisdiction of the cause and of the parties." While such an admission would be without significance in determining the court's jurisdiction, we think that it must be said that the trial court determined that it had jurisdiction under the rule that "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." Stoll v. Gottlieb, 305 U.S. 165, 171-172; cf. Yanow v. Weyerhaeuser Steamship Company, 274 F.2d 274. We think that by the judgment here under review, the trial court has in effect adjudged, with respect to Southern Railway Company, that it was not true that "its principal office and place of doing business" was in Georgia.

corner of the car near the front and received injuries from which the jury might have ascertained, on the basis of evidence received, that plaintiff had suffered quite substantial damages. There was evidence from which the jury might have found that as a result of the accident plaintiff was disabled from working for a considerable length of time and lost earnings in excess of $12,000. He underwent an operation for the relief of his injuries; he testified to severe pain and suffering; and there was evidence that some of his injuries were permanent. His medical and hospital bills were in excess of $1300.

Appellant asserts that what he calls a "grossly inadequate verdict" was due to the trial court's error in giving an instruction on comparative negligence in which the jury were told in substance that if the plaintiff was himself negligent and the negligence of plaintiff was less than that of the defendant, plaintiff's recovery "would be reduced in proportion to the amount of default attributable to him."[2] Plaintiff objected to the giving of this instruction on the ground that there was no evidence to support or warrant it.

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2. After a charge to the jury to the effect that plaintiff would be barred from any recovery in the event of his own contributory negligence, the court's charge relating to comparative negligence proceeded as follows: "I charge you, gentlemen of the jury, that if you believe from the evidence that the defendant was negligent and if you further believe from the evidence that a particular plaintiff could not, in the exercise of ordinary, have avoided the consequences of the negligence of the defendant, but if you believe that such plaintiff was himself negligent and if you further believe that such negligence on the part of such plaintiff was less than the negligence of the defendant contributing to the alleged injury to such plaintiff, then, and in such event, such plaintiff could recover, but his recovery would be reduced in proportion to the amount of default attributable to him."

The contention of the defendant with respect to the propriety of that instruction, a contention with which the trial court agreed, is based upon evidence given by the several railway mail clerks who were in the mail car at the time. This shows that one Billingsley, a mail clerk, stood at the door of the mail car, and looked ahead as the train was approaching the point where the collision occurred. Jackson, the plaintiff, was then some distance away, he said 20 feet from the door. He was in a position where he could neither see out the door nor see ahead along the train. Billingsley, who had gone to the door, evidently for the purpose of throwing out mail as it passed the next town, looked ahead and said that the train had run a "red board"; that it had gone through a red stop signal, and that the train was not stopping. According to Billingsley he said: "I don't believe he could stop at the red light: the lights are red; and I don't believe he can stop."

Billingsley estimated that this was some 20 seconds before the actual collision occurred. He did not yell; he merely made the statement. Jackson heard this statement and replied that it was on a double track. According to Jackson's testimony he said: "You crazy idiot, its double track." Billingsley continued to watch, and he then said: "No he's on the same track, watch out, they're going to hit." Billingsley shouted this last warning. He estimated that the collision occurred "five or six or seven seconds" after that second alarm.

McClure, another clerk, who was in charge of the car, told about this second alarm from Billingsley. When Billingsley said there was going to be a collision: ". . . one of the boys said 'you mean that?' And he said, 'Yes, I mean it, and brace.' Well, of course, in the next four or five seconds, or maybe eight seconds nobody would time that sort of thing or could, the impact came". When asked to

estimate the time that elapsed after that last warning until the collision, Jackson estimated that it was fifteen seconds.

When that warning of a collision came, Jackson grabbed the rack on which the mail sacks were hung and when the impact came he was thrown some 20 feet forward landing in the forward corner of the mail car. Billingsley, in the meantime, had moved to the center aisle between the racks and grabbed the side of a distributing table. Although the table was bolted to the floor, when the collision occurred Billingsley pulled it loose and he was found on the floor covered with mail sacks.[3]

The basis for the defendant's claim of contributory negligence is the showing that there was in the car an emergency brake valve; that Jackson did not pull the cord on that valve, and that had it been pulled, the train's emergency brake system would have been put in action. The only evidence as to where this valve was located, comes from the testimony of Billingsley that as he observed the red lights from his position in the door the emergency cord was six to eight feet from him. It does not appear in which direction that was. The record contains an exhibit No. 14, which is a diagram of the car in question. This does not show where the emergency valve was located. Its location may well have been at the rear wall of the car which was some eight feet from the door, or it may have been on

3. There was a fourth mail clerk in the car, one Gardner, who heard Billingsley call out but did not hear what he said. Gardner was near the table to which Billingsley clung and to which Billingsley was "moving in a hurry". In some inexplicable manner, after the accident Gardner found himself "hanging out of the door, and the mail was all over him." As the door was to the rear of the table it is difficult to understand how Gardner got there unless the car rebounded after the collision.

the locker against the rear wall which would be some seven or eight feet from the door. Apparently that would be a likely location for the valve, though there is no evidence to that effect. Jackson was farther away from that location than Billingsley at that time.

The defendant's contention was that Jackson, who had previous experience as a railroad fireman, was negligent in not going to that emergency valve and pulling the cord after he had been warned by Billingsley that a collision was about to occur. The contention was and is that Jackson had fifteen seconds in which to do that because according to the latter's testimony fifteen seconds elapsed between the time when Billingsley shouted his warning and the time when the collision occurred.

We think that this contention is manifestly fallacious. A showing of negligence on the part of Jackson cannot be based upon the time which actually elapsed between Billingsley's warning and the collision. That has no bearing upon the question of Jackson's negligence. The question is what did Jackson then know as to the imminence of the collision or as to a possible time lapse. So far as the record is concerned, it shows nothing. Jackson could not see out of the car; he had no way to estimate whether the collision would happen in one second, two seconds, or half a second. He did the only thing which he could possibly do to protect himself from an accident—he grabbed the racks and hung on with both hands.

It would be fantastic to assume that Jackson should have measured the distance to the valve, wherever it was, and calculated that he had time to run to the valve and then run back to grab the racks. Furthermore there is nothing to show where the valve was aside from its distance from Billingsley. For aught that appears here Jack-

son might have to pass over or around mail pouch racks to get there. A person confronted with a sudden peril not arising from any fault of his own, "will not be held negligent when he exercises the right to take care of himself in order to avoid injury, provided he acts with such care as an ordinarily prudent person would exercise." *Everett v. Clegg*, 213 Ga. 168, 170, 97 S.E.2d 689, 691.

The court correctly charged the jury that in this case: "The defendant owed to [the plaintiff] the duty of extraordinary care, the same duty it would have owed to any passenger on the defendant's train." We do not have any reason to question this portion of the charge given by the learned trial judge who was familiar with Georgia law. That a railway mail clerk is as a matter of law a passenger of the carrier is supported by a great weight of authority.[4] We have no reason to believe that Georgia would follow any different rule and this rule is certainly consistent with the definition of a passenger under the Georgia Code.[5] The mail clerk's fare is of course a part of the compensation which the Post Office pays the railroad for hauling the mail car. The proposition that any person in the

4. Southern Ry. Co. v. Harrington, 166 Ala. 630, 52 So. 57; Malott v. Central Trust Co., 168 Ind. 428, 79 N.E. 369; Louisville & N. R. Co. v. Dougherty, 170 Ky. 10, 185 S.W. 114; Libby v. Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943; Baltimore & O. R. Co. v. Davis, 152 Md. 427, 137 Atl. 30; Decker v. Chicago, M. & St. P. Ry. Co., 102 Minn. 99, 112 N.W. 901; Nix v. Gulf, Mobile & Ohio R. Co., 362 Mo. 187, 240 S.W.2d 709; Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394, 102 Pac. 988; Seybolt v. New York, etc., R. Co., 95 N.Y. 562; Miller v. Pennsylvania R. Co., 368 Pa. 507, 84 A.2d 200; Illinois Cent. R. Co. v. Porter, 117 Tenn. 13, 94 S.W. 666; Carter v. Washington & O. D. Ry., 122 Va. 458, 95 S.E. 464.

5. Ga. Code Ann., § 18-201: "A passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of the fare or that which is accepted as an equivalent therefor. . . ."

position of a passenger, whether in a passenger car or in a mail car, owes a duty to stop a run-away train by throwing on the emergency brake system is something that we cannot accept. Even if there ever were such a duty, certainly this is not such a case. The complete absence of evidence to show any lack of care on Jackson's part made the giving of the instruction here involved completely out of order.

It is the settled law of Georgia that it is error for a trial court to instruct a jury on contributory negligence when there is no evidence of such negligence.[6] The rule can be no different with respect to an instruction based upon the Georgia statute relating to comparative negligence which provides that if the complainant and the agents of the company are both at fault, the former may recover but the damages shall be dimmished by the jury in proportion to the amount of the fault attributable to him. Ga. Code Ann. § 94-703.[7]

If we assume that since this was a diversity case tried in a federal court, the question of what matters are to be

6. Bain v. The Athens Foundry and Machine Works, 75 Ga. 710, 720; Healan v. Powell, 91 Ga. App. 787, 793, 87 S.E.2d 332, 336; Hare v. Southern Railway Company, 61 Ga. App. 159, 161, 6 S.E.2d 62, 66; Andrews Taxi & U-Drive-It Company v. McEver, 101 Ga. App. 383, 386, 114 S.E.2d 145, 148.

7. The entire section reads as follows: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him."

Section 105-603 reads as follows: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may

submitted to a jury is governed by federal law. *Sinder* v. *Conner*, — U.S. —, (Feb. 18, 1963) we still reach the same result as to the impropriety of the instruction here in question.

In holding that a trial by jury in a federal court is to be governed by federal law, the Supreme Court spoke in *Herron* v. *Southern Pacific*, 283 U.S. 91, 95, as follows: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in *United States* v. *Battiste*, 2 Sumner, 240 243: 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.'"

The Court also quoted from the oft-cited case of *Capital Traction Company* v. *Hof*, 174 U.S. 1, 13-14: Such is still the law. *New York, N. H. & H. R. Co.* v. *Henagan*, 364 U.S. 441.

It is improper for a court to instruct on a proposition of law about which there is no evidence. *McCarthy* v. *Pennsylvania R. Co.*, 7 Cir., 156 F. 2d 877; *Jones* v. *Weaver*, 9 cir., 123 F. 2d 403, 407. Such an instruction should be refused. *Willitt* v. *Purris*, 5 cir., 276 F. 2d 129 132. Here, under the circumstances present, where the giving of this instruction improperly permitted the jury to find the plaintiff guilty of comparative negligence, the giving of the instruction was prejudicial error. *Fillipon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82. *McCandless* v. *United States*,

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a. "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions

298 U.S. 342, 347-348; *Farris* v. *Interstate Circuit*, 5 cir., 116 F. 2d 409, 412; *Standard Accident Insurance Co.* v. *Terrell*, 5 cir., 180 F. 2d 1, 4.

Accordingly, the judgment is reversed and the cause is remanded for a new trial.

A true copy
Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ Clara R. James
Deputy

New Orleans, Louisiana, June 19, 1963.

(Seal)

A11

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 19901

---

JOHN H. JACKSON,
Appellant,

versus

SOUTHERN RAILWAY COMPANY,
Appellee.

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Appeal from the United States District Court for the Northern District of Georgia.
(June 7, 1963)

Before TUTTLE, Chief Judge, and POPE* and JONES, Circuit Judges.

PER CURIAM: Upon petition for a rehearing appellee asserts that the court has misread the record, which, it asserts, showed Jackson's ability and duty to protect himself by applying emergency brakes as the train approached the collision point. The following assertions are made: that photographs in evidence showed that the emergency cord extended the entire length of the car; that Jackson could see the red lights ahead through the car windows; and that he could have run to the car door to look for himself. We find no such evidence in the record. The significant fact noted in our opinion is that Jackson, after warn-

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* Of the Ninth Circuit, sitting by designation.

ing, "had no way to estimate whether the collision would happen in one second, two seconds, or half a second." It is for this reason that the unsupported assertions now made would be irrelevant if true.

It is elementary that the burden of proof of comparative negligence on the part of a plaintiff is on the defendant. *Western & Atlantic R.R.* v. *Mathis*, 63 Ga. App. 172, 10 S.E.2d 457, 460. The failure of the record to show circumstances requiring Jackson to act in the manner appellee asserts he should have done amounts to a simple failure of proof.

The petition for rehearing is denied.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By s/ Clara R. James
Deputy

New Orleans, Louisiana, June 19, 1963.

(Seal)

A13.

**Order Denying Rehearing**

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Extract from the Minutes of June 7, 1963.

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No. 19901.

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JOHN H. JACKSON,

vs.

SOUTHERN RAILWAY COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * *

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,901

D. C. Docket No. 7516 Civil A. D.

JOHN H. JACKSON,
Appellant,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, and Pope* and Jones, Circuit Judges.

**Judgment**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellee, Southern Railway Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 4, 1963

*Of the Ninth Circuit, sitting by designation.

Issued as Mandate:

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19901

JOHN H. JACKSON,
Appellant,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the abovementioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 17th day of June, 1962.

Walter L. Pope,
United States Circuit Judge.

(Original Filed June 19, 1965.)

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 19,901

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JOHN H. JACKSON,
Appellant,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

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**Order**

IT IS ORDERED that the Stay of the Mandate heretofore entered on the 17th day of June, 1963, is hereby extended to and including the 5th day of August, 1963.

/s/ Elbert P. Tuttle,
Chief Judge, United States
Court of Appeals.

Dated: (Original Filed July 16, 1963)

Office-Supreme Court, U.S.
FILED
AUG 29 1963
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1968**

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## No. 332

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**SOUTHERN RAILWAY COMPANY,**
**Petitioner,**

**versus**

**JOHN H. JACKSON,**
**Respondent.**

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

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## BRIEF OF RESPONDENT, JOHN H. JACKSON, IN OPPOSITION TO GRANTING OF CERTIORARI.

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T. J. LEWIS,
T. J. LEWIS, JR.,
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Atlanta 3, Georgia,
Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

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No. .....

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SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

JOHN H. JACKSON,
Respondent.

---

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

---

# BRIEF OF RESPONDENT, JOHN H. JACKSON, IN OPPOSITION TO GRANTING OF CERTIORARI.

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## QUESTIONS PRESENTED.

The trial court included in its charge a charge on contributory negligence and on comparative negligence (R. 654). The United States Court of Appeals for the Fifth Circuit held that it is improper for a court to instruct on a proposition of law about which there is no evidence. The court further held that such an in-

struction should be refused and that in this particular case, under the circumstances present, where the giving of this instruction improperly permitted the jury to find the plaintiff (respondent) guilty of comparative and contributory negligence, the giving of the instruction was prejudicial error. The U. S. Court of Appeals for the Fifth Circuit accordingly reversed the judgment of the District Court and remanded the cause for a new trial.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Respondent respectfully submits that in addition to the constitutional provision and statutes set forth by the appellant, that Georgia Code Annotated, Section 18-201, is pertinent for the proper and adequate review of this case. Georgia Code Section 18-201 reads as follows:

> "Passenger defined.—A passenger is one who travels in some public conveyances by virtue of a contract, express or implied, with the carrier as to the payment of the fare or that which is accepted as an equivalent therefor. The prepayment of fare is not necessary to establish the relation of passenger. While a carrier may demand prepayment of fare, if, by its permission, persons enter his vehicle with the intention of being carried, an obligation to pay fare is implied on the part of the passenger, and the reciprocal liability of the carrier arises."

Respondent further respectfully submits that Georgia Code, Section 18-204, is pertinent to the proper review of this case. Georgia Code, Section 18-204 reads as follows:

> "Diligence required of carriers.—A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers, but is not liable for injuries to them after having used such diligence."

## STATEMENT OF FACTS.

Respondent respectfully submits that in addition to the statement of facts set forth by the petitioner in its petition for writ of certiorari, that there are other facts which are necessary for a proper review of this case.

The uncontradicted testimony of the Railway Postal Clerks riding in this car at the time of the collision and the uncontradicted testimony of the respondent, John Jackson, indicates that the first knowledge that Jackson had of an impending collision was when Mr. Billingsley had gone to the door and turned and hollered that they were going to have a collision and that this happened just a few seconds before the impact occurred. (R. 90, 140, 174, 208, 209, 210.)

The uncontroverted facts show that the two (2) trains involved in the collision belonged to the Southern Railway Company, petitioner herein, and collided head-on. (R. 40.)

The evidence clearly shows that the plaintiff had no knowledge of an impending accident (collision) until just a very few seconds before the collision actually took place. The time between the first knowledge by the plaintiff of an impending collision and the actual collision was estimated from thirty (30) seconds down to five (5) to eight (8) seconds. (R. 90, 140, 174, 208, 209, 210.)

The testimony of John Jackson is that when Mr Billingsley hollered that it was going to hit, he (Jackson) grabbed across two (2) racks. (R. 133.) The uncontradicted evidence shows that the light was red and that there was no question but that the engineer ran the red signal. (R. 559, 560.) However, this fact was known by Jackson only from information relayed by Billingsley (R. 208); he (Jackson) did not personally see the red boards.

The petitioner, on page 10 of its petition for writ of certiorari to this Honorable Court, set forth four (4) statements which it contends were the holdings of the appellate court.

The respondent respectfully submits to this Honorable Court that the United States Court of Appeals for the Fifth Circuit held substantially as follows:

(1) It is improper for a Court to instruct on a proposition of law about which there is no evidence. Such an instruction should be refused.

(2) The complete absence of evidence to show any lack of care on Jackson's part made the giving of the instruction on contributory negligence error. Where the giving of this instruction improperly permitted th jury to find the plaintiff guilty of comparative negligence, the giving of the instruction was prejudicial error.

(3) It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the Court.

(4) That a railway mail clerk is as a matter of law, a passenger of the carrier is supported by a great weight of authority and that a person confronted with a sudden peril not arising from any fault of his own will not be held negligent when he exercises the right to take care of himself in order to avoid injury provided he acts with such care as an ordinarily prudent person would exercise.

## ARGUMENT.

The respondent respectfully submits to this Honorable Court that the writ of certiorari should be denied. The appellate court has not pre-empted the jury's function in any way in this case, and the spirit and intent of the Seventh Amendment to the United States Constitution has not been violated here. The petitioner makes much comment on conflicting evidence. Respondent respectfully submits that there is no conflict in the evidence as pertains to *material* facts of

this occurrence. There is no doubt that these two (2) trains collided head-on. There is no doubt that both trains belonged to Southern Railway Company, petitioner herein, and were being operated by the Southern Railway Company through its employees. There is no doubt that the first knowledge that the respondent had of the impending collision was just a few seconds before the actual collision occurred. The uncontradicted evidence clearly shows that John Jackson, acting in a sudden emergency, tried to prevent injury to himself by grabbing across two (2) racks. (R. 133.)

The petitioner asserted contributory negligence on the part of the respondent as a defense. (R. 560, 561.) This is an affirmative defense and the burden of proof of this defense of contributory negligence shifts to the party asserting it, and the Southern Railway Company did not carry the burden in this case.

The petitioner keeps bringing forth this argument concerning contributory negligence. However, there is no evidence in the case to show that the pulling of the emergency cord would have prevented the accident or would have diminished the impact between the two (2) trains or lessened respondent's injuries.

This Honorable Court stated in the case of *Herron vs. Southern Pacific*, 283 U. S. 91, 95.

> "In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law. This

discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Storey in the United States v. Battiste, 2 Sumner, 240, 243: 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.'"

In the case of *Whitsell vs. Alexander*, 229 Fed. 2d 47, Headnote 3—Federal Civil Procedure—Keynote 2126:

> "Trial court should grant directed verdict when evidence is such that there are no controverted issues of fact upon which reasonable men could differ, and neither summary judgment nor direction of verdict infringes right to jury trial preserved by the Seventh Amendment to the Constitution where question is one of law."

In the case of *McCarthy vs. Pennsylvania Railroad Company*, 156 Fed. 2d 877 (10)—Trial Keynote 252 (1):

> "An instruction on a proposition of law about which there was no evidence was erroneous."

In the case of *Simler vs. Conner*, which was argued before this Honorable Court on January 9-10, 1963, Volume 372, U. S. No. 1, page 221, it was held that in diversity cases, the substantive dimension of the claim asserted finds its source in state law. See also *Erie Railroad Company vs. Tompkins*, 304 U. S. 64.

The respondent respectfully submits that under the law of Georgia, it is error for a trial court to instruct a jury on contributory negligence where there is no evidence of such negligence. See *Bain vs. Athens Foundry and Machine Works*, 75 Ga. 718, 725; *Healan vs. Bowen*, 91 Ga. App. 787, 793.

Thus, the respondent respectfully submits to this Honorable Court that there was no evidence to support an instruction by the District Court on contributory and comparative negligence. Therefore, the petitioner's rights under the Seventh Amendment to the Constitution of the United States have not been violated by the ruling of the United States Circuit Court of Appeals for the Fifth Circuit.

## CONCLUSION.

Respondent respectfully submits that the petition for writ of certiorari filed by the Southern Railway Company, petitioner, should be denied.

T. J. LEWIS,

T. J. LEWIS, JR.,

R. BEVERLY IRWIN,
Attorneys for Respondent.

1018 Healey Building,
Atlanta 3, Georgia.

## PROOF OF SERVICE.

STATE OF GEORGIA
COUNTY OF FULTON

Before me, the undersigned attesting officer duly authorized to administer oaths, personally appeared R. BEVERLY IRWIN, who after being duly sworn deposes and says that on the .... day of ..... 1963, he served by mail upon Mr. Edgar Neely, 1240 Bank of Georgia Building, Atlanta, Georgia, attorney for petitioner, Southern Railway Company, a copy of the brief of respondent, John H. Jackson, in opposition to granting of certiorari.

R. BEVERLY IRWIN

Sworn to and subscribed before me this .... day of August, 1963.

JOYCE ANN ALLRED
Notary Public

Office-Supreme Court, U.S.
FILED
SEP. 3 1963
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 332

SOUTHERN RAILWAY COMPANY,
*Petitioner,*

vs.

JOHN H. JACKSON,
*Respondent.*

## RESPONSIVE BRIEF ON BEHALF OF PETITIONER, SOUTHERN RAILWAY COMPANY

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## RESPONSIVE BRIEF ON BEHALF OF PETITIONER, SOUTHERN RAILWAY COMPANY

I.

Respondent's Brief correctly points out the following:

1. There was ample evidence of negligence on the part of the Railway (whether the Railway owed Jackson, a United States Mail clerk, a duty of ordinary care or a duty of extraordinary care is neither crucial nor germane to the present issue).

2. A trial Judge generally must not leave to jury determination a question as to which there is *absolutely no evidence.*

3. A Trial Court should grant a directed verdict when the evidence is such that there are no controverted issues of fact upon which reasonable men could differ.

Respondent's Brief does *not* point out the following.

1. If there is *any* evidence at all upon a given germane question, the trial Judge is under a duty to submit that question to the jury.

2. If on the question of liability there is under the evidence *any* controverted issue of fact upon which reasonable men could differ, it is error for the Trial Judge to direct a verdict as to liability.

3. The Trial Judge, a reasonable man, thought during the trial that there were *some* evidences from which the jury would be authorized (though not required) to find that Jackson (*a Railway Fireman of long experience*, but on the day in question employed by the United States as a Mail Clerk) was guilty of negligence contributing to his injury and thus under Georgia Law going in diminishment of any damage to which he might otherwise be entitled.

4. The Trial Judge, a reasonable man, upon the reflection afforded by a motion for new trial in behalf of Jackson (who was not satisfied with the amount of his recovery ($2,500.00) but who even if liability had been absolute obtained a quite adequate recovery) still concluded that there was *some* evidence in the record from which the jury would have been authorized (but not required) to find that Jackson was guilty of negligence contributing to his injury.

5. In denying Jackson's motion for new trial, the Trial Judge wrote an opinion conclusively demonstrating that there was some evidence from which the jury would have been authorized (but not required) to find that Jackson under Georgia Law was guilty of contributory negligence with the result that it would have been error to fail to give an instruction upon the subject of contribu-

tory (comparative) negligence and that it would have been error to direct a verdict in favor of Jackson on liability. (The petition for Certiorari cites chapter and verse buttressing the opinion of the Trial Court.)

6. The Court of Appeals, improperly construing the evidence most strongly against petitioner, rather than most strongly in favor of the leaving of the issue to the jury, reversed the Trial Court, thereby holding in effect that under the evidence presented upon the trial, petitioner's liability was absolute and no jury question was presented.

II.

The statement in Respondent's Brief that

". . . there is no evidence in the case to show that the pulling of the emergency cord would have prevented the accident or would have diminished the impact between the two trains or lessened respondent's injuries."

is wholly incorrect. In rebuttal of Respondent's assertion quoted above, see the opinion of the Trial Judge quoted on page nine (9) of the Petition For Certiorari, and review pages five (5), six (6), and seven (7) of the Statement of Facts of the Petition for Certiorari.

III.

The Trial Judge recognized and applied the doctrine that questions of negligence, contributory negligence, and proximate cause are for the jury. The Court of Appeals decided to make itself the trier of the facts. To this end, it harshly construed the evidence in the same fashion as would a juror who happened to disagree with the Railway's position on the issue. The Court of Appeals should have construed the evidence liberally in favor of a jury question and in favor of upholding the action of the Trial

Court—which action the Trial Court confirmed by denying motion for new trial.

IV.

This Court is committed to the doctrine that questions of negligence are for the jury and that the evidence must be liberally construed to this end. This Court is committed to the doctrine that "what is sauce for the goose is sauce for the gander," to-wit:

In determining whether a Plaintiff, upon whom the burden of proof of Defendant's negligence rests, may go to a jury, the evidence must be liberally construed in favor of a jury issue. Similarly, in determining whether a Defendant, upon whom the burden of proof of contributory negligence rests, can go to a jury on that issue, the evidence must be just as liberally construed in favor of a jury issue

Petition for Certiorari should be granted.

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## CERTIFICATE

Copies mailed to opposing counsel as per Certificate of Service on file.

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IN THE

# SUPREME COURT OF THE UNITED STATES

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## No. 332.

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## SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, SOUTHERN RAILWAY COMPANY.

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IN THE

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SOUTHERN RAILWAY COMPANY,
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## SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER SOUTHERN RAILWAY COMPANY

I.

Attention is invited to the recent case of *Justice v. Pennsylvania Railroad Company*, 191 N.E.2d 72 (Ill. 1963), and more particularly to the following language:

> "Under the Federal Employers' Liability Act the issue of negligence as well as plaintiff's contributory negligence is one for the jury to determine. . . . Only in the clearest case, where the hypothesis of contributory fault is not fairly admissible, does the question become one of law for the termination by the court.

> . . . Otherwise it is the very essence of the jury's function to select from among conflicting inferences and conclusions that which it considers most reasonable. It can choose any reasonable hypothesis—and this is true of a defendant's negligence as it is of a plaintiff's contributory negligence. *Marty v. Erie R.R. Co.*, 163 A.2d 167.
>
> "In *Daulton v. Southern Pacific Company*, 237 F.2d 710, where there were no eye witnesses, it was held that the jury had a right to search the evidence in order to reconstruct and determine what happened. On contributory negligence, the court stated, 'surely the company, on contributory negligence is entitled to have the same rule work in its favor. . . . The lesson seems to be in *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 100 L. Ed. 668, that a jury can choose any reasonable hypothesis and that *the rule works both ways* . . .' Under the facts in this case it is not apparent that there was *no possible basis* to find some contributory negligence. Thus, it was not a question of law for the court and the instruction should have been given." Pages 74 and 75. (The italics are ours.)

While this case was an FELA case, it does show that this court is committed to the doctrine that "what is sauce for the goose" on negligence "is sauce for the gander" on contributory negligence and that the trial court properly gave the instruction in question for the reason that there was some possible basis to find some contributory negligence.

Actually we say that the charge on contributory negligence was demanded, but all this Court has to do to uphold the trial court (by reversing the incorrect decision of the Court of Appeals for the Fifth Circuit) is to hold that the charge on contributory negligence was warranted.

Petition for Certiorari should be granted.

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